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No. 90-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

MCORP, MCORP FINANCIAL INC. AND
MCORP MANAGEMENT,

and

OFFICIAL CREDITORS' COMMITTEE OF MCORP,
MCORP FINANCIAL, INC. AND MCORP MANAGEMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT BRIEF OF MCORP, *et al.*, IN OPPOSITION TO PETITION OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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February 11, 1991

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the Board of Governors of the Federal Reserve System lacked statutory authority to compel a bank holding company to transfer all its available assets into its subsidiary banks.

2. Whether the Board of Governors' source-of-strength assessment Policy Statement is unenforceable because it was adopted in violation of the notice and comment requirements of the Administrative Procedure Act.

3. Whether the court of appeals properly remanded this case to the district court with instructions to enjoin the Board of Governors of the Federal Reserve system from further prosecution of its source-of-strength charges.

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STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Bank Holding Company Act of 1956 ("BHC Act") (12 U.S.C. § 1841 *et seq.*), the International Lending Supervision Act of 1983 ("ILSA") (12 U.S.C. §§ 3907, 3909) and the Financial Institutions Supervisory Act of 1966 ("FISA") (12 U.S.C. § 1818), as amended by Section 902 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), are set forth in Appendix D to the Board's Petition. Pertinent sections of amendments to the National Bank Act adopted in 1933, 1935, 1953 and

1959, and of the Administrative Procedure Act, 5 U.S.C. § 553 ("APA"), are reprinted in an appendix hereto.

STATEMENT OF CASE

On June 9, 1989, the United States District Court for the Southern District of Texas, sitting in bankruptcy, ruled that the Board of Governors of the Federal Reserve System (the "Board") was not exempt from the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, and granted in full MCorp's motion for a preliminary injunction enjoining the Board from prosecuting two separate administrative enforcement proceedings against MCorp [1] involving: (1) an alleged violation by MCorp of section 23A of the Federal Reserve Act (12 U.S.C. § 371c), and (2) an attempt to compel MCorp, pursuant to the Board's purported source-of-strength assessment authority, to transfer all its available assets to its subsidiary national banks, 20 of which were closed and placed in receivership on March 28, 1989.[2]

On May 15, 1990, the United States Court of Appeals for the Fifth Circuit vacated the injunction with respect to proceedings on the Board's Section 23A charges, ruling that the Bankruptcy Code did not supersede the Board's jurisdiction to prosecute its Section 23A charges against MCorp.[3] In addition, the court of appeals re-

[1] MCorp is the parent company of both MCorp Financial, Inc. and MCorp Management. MCorp, MCorp Financial, Inc. and MCorp Management have no subsidiaries other than wholly owned subsidiaries of such corporations.

[2] In two related cases, the United States District Court for the Northern District of Texas has ruled that the Federal Deposit Insurance Corporation ("FDIC") and Comptroller of the Currency violated the National Bank Act in closing 12 of these banks that were solvent when seized. *MBank New Braunfels* v. *FDIC*, 721 F. Supp. 120 (N.D. Tex. 1989); *MCorp* v. *Clarke*, No. CA3-89-0831F, (N.D. Tex. Feb. 1, 1991) (copy lodged with Clerk of this Court).

[3] MCorp has filed a petition for a writ of certiorari seeking review of this aspect of the court of appeals decision. *MCorp Financial, Inc.* v. *Board of Governors*, *petition for cert. filed*, No. 90-914. The Court can resolve the distinct and separate substantial issues presented in that certiorari petition relating to the interplay between the Bankruptcy Code and the scheme of federal bank regulation without addressing the different issues the Board raises here.

manded to the district court with instructions to enjoin proceedings on the Board's source-of-strength charges because those "proceedings exceed[ed] its statutory authority." Board Pet. App. at 26a. On August 6, 1990, the court of appeals denied the Board's petition for rehearing and suggestion for rehearing *en banc*, and MCorp's suggestion for rehearing *en banc*.

On December 6 and December 20, 1990, after obtaining approvals from the bankruptcy court and the banking regulators, MCorp sold two of its five surviving subsidiary banks. MCorp has signed contracts for the sale of two more of its surviving banks. MCorp presently is negotiating with a potential purchaser of the remaining bank.

REASONS FOR DENYING THE WRIT

INTRODUCTION

The court of appeals correctly ruled that the source-of-strength assessment policy—pursuant to which the Board claims authority to compel a bank holding company to contribute all its available funds to a subsidiary bank—clearly exceeds the Board's statutory authority. The Board purports to find this authority from a "construction of interrelated statutory schemes" (Board Pet. at 14), although, as the Board concedes, no statute expressly grants this authority. The Board neglects to note, however, that on many occasions over the past 58 years, Congress has considered the very authority the Board asserts in its petition and in each instance refused to grant the Board the authority to compel bank holding companies to pour all their available funds into subsidiary banks. Indeed in the Banking Acts of 1933 and 1935, which established the initial framework for the regulation of bank holding companies, Congress expressly pro-

hibited banking regulators from imposing mandatory assessments on shareholders of national banks. More recently, the issue of shareholder assessment powers was again before Congress in 1987, 1988, 1989 and 1990, and is now pending before the current session of Congress in two bills introduced last month. To date, however, Congress has rejected these legislative efforts to invest the Board with shareholder assessment powers.

Moreover, contrary to the Board's unsupported assertions, the source-of-strength assessment policy is not "critically important" to the protection of the banking system and the federal deposit insurance funds, and its invalidity does not create a "regulatory vacuum." Since 1987, when the Board first proclaimed its source-of-strength assessment authority, both the economic wisdom and the legality of this purported authority have been challenged by the FDIC which, as the government agency responsible for administering the deposit insurance funds, would bear any "additional liability" to which those funds are exposed. *See* pp. 9, 12, *infra*. The FDIC instead sought and obtained for itself the statutory power to assess federally insured banks, but not bank holding companies or their nonbank subsidiaries, for the FDIC's losses in closing affiliated banks.

The Board's policy arguments for a source-of-strength assessment power—as well as any contrary arguments from the FDIC and other authorities—should properly be addressed, as they have been in the past, to Congress. They do not raise judicial issues warranting review by this Court.

Furthermore, the Board's 1987 source-of-strength Policy Statement purports to impose a substantive obligation and thus constitutes a "substantive rule", which could be adopted only in accordance with the notice and comment requirements of section 553 of the APA. Therefore, in addition to the absence of statutory authority, the Board's failure to comply with APA requirements for promulgating a substantive rule also renders the Policy Statement void and unenforceable.

Finally, the Board's jurisdictional arguments do not apply to *ultra vires* agency proceedings, and as a practical matter would not preclude MCorp from obtaining an early judicial ruling on the validity of source-of-strength assessments.

I. THE BOARD'S PROPOSED SOURCE-OF-STRENGTH ASSESSMENT AUTHORITY IS WHOLLY WITHOUT STATUTORY SUPPORT

A. Shareholder Assessments Were Banned by Congress

The Board concedes that it has no express statutory authority to assess bank holding companies for the losses of subsidiary banks, Board Pet. at 22-23, but argues that three statutes, when read together and considered as a whole, somehow impliedly grant it such authority.[4] According to the Board, nothing in these statutes "precludes the Board from determining—as a matter of sound federal banking policy—that bank holding companies, despite their legal status as separate corporate entities, must ultimately remain accountable for the capital adequacy of their subsidiary banks." Board Pet. at 25.

This unprecedented statutory analysis turns the law upside down. Agency authority must be rooted in an affirmative statutory grant. There can be no plenary grant of authority to administrative agencies to invest themselves with any power not expressly precluded by statute.

More importantly, the Board's theory incorrectly assumes Congressional silence on the issue of shareholder assessment authority. To the contrary, Congress has spoken directly to this issue on a number of occasions. As noted by the FDIC, the Board's claimed authority to assess bank holding companies for losses of capital of subsidiary banks is inconsistent with the repeal by Con-

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[4] The BHC Act, 12 U.S.C. § 1842(c), FISA, 12 U.S.C. § 1818, and ILSA, 12 U.S.C. § 3901 *et seq.* Board Pet. at 23-29.

gress of the various shareholder assessments previously authorized under the National Bank Act.[5]

As originally enacted in 1864, the National Bank Act imposed double liability on shareholders of national banks.[6] In a series of four amendments to the National Bank Act adopted in 1933, 1935, 1953 and 1959, Congress repealed these shareholder assessment provisions and completely eliminated the assessability of national bank stock.[7] These amendments embody the "manifest purpose and intention on the part of Congress to do away with the so-called 'stockholders' double liability' *and to ultimately abandon the same as a policy in the regulation of the banking business.*" [8]

In adopting these amendments Congress was quite aware that bank holding companies owned national

[5] *See* FDIC, *Mandate for Change: Restructuring the Banking Industry* 94 (Oct. 1987). All of MCorp's current and former subsidiary banks involved in the Board's action are (or were prior to their seizure) national banks.

[6] Act of June 3, 1864, ch. 106, 13 Stat. 99, formerly codified at 12 U.S.C. § 63. National bank shareholders were individually responsible for all "contracts, debts, and engagements" of the national bank "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

[7] Banking Act of 1933, Pub. L. No. 73-66, § 22, 48 Stat. 162 (1933); Banking Act of 1935, Pub. L. No. 74-305, § 304, 49 Stat. 684 (1935); Act of May 18, 1953, Pub. L. No. 83-28, 67 Stat. 27 (1953); Act of Sept. 8, 1959, Pub. L. No .86-230, § 7, 73 Stat. 457 (1959). Over the same period, most of the states similarly repealed shareholder assessment provisions applicable to state-chartered banks. *Anderson* v. *Abbott*, 321 U.S. 349, 381 n.8 (1944) (Jackson, J. dissenting). Similarly, the FDI Act was amended to require the FDIC, acting as receiver, to waive stockholder assessments that might exist under state law. 12 U.S.C. § 1821(g)(3).

[8] *FDIC* v. *Henrich*, 26 F. Supp. 293, 294 (D.S.D. 1939), *aff'd*, 106 F.2d 633 (8th Cir. 1939) (emphasis added); *accord* H.R. Rep. No. 259, 83rd Cong., 1st Sess. (1953) ("It is the opinion of [the Housing banking] committee that the double liability feature on national bank stock should be once and for all eliminated.")

banks, and yet chose not to retain or impose any statutory provisions permitting assessment of national bank shares held by holding companies.[9] The last of the four amendments prohibiting assessment of national bank stock was enacted three years after the BHC Act.[10] Notably, section 19 of the Banking Act of 1933, which contained the initial provisions for Board regulation of bank holding companies, required a holding company to establish a special fund of liquid assets to satisfy assessments on national bank stock issued prior to 1933, which remained subject to assessment, and on the stock of those state-chartered banks for which assessability had not yet been repealed.[11] Ultimately, this liquid asset fund requirement was repealed as obsolete by the Bank Holding Company Act Amendments of 1966.[12]

Congress was keenly aware that, by eliminating the assessability of national bank stock, it was permitting shareholders to choose not to support a troubled bank.[13]

[9] *See* Banking Act of 1933, § 19 (the first federal statutory provisions governing bank holding companies), § 22 (providing that shares issued after adoption of Act were not assessable); Banking Act of 1935, § 311 (regulating bank holding company voting the stock of its subsidiary banks), § 304 (providing that shares of national bank not assessable after publication of notice); *Anderson* v. *Abbott*, 321 U.S. at 375-80 (Jackson, J., in dissent to a decision involving a pre-1933 assessment of national bank shares that was passed through as an assessment on shareholders of the bank's holding company, noted that Banking Act of 1933 both repealed assessability of national bank stock and provided for regulation of bank holding companies, but did not retain or create special assessment provisions applicable to bank holding companies).

[10] Pub. L. No. 86-230, § 7, 73 Stat. 457 (1959).

[11] Banking Act of 1933 § 19(b), (c), Pub. L. No. 73-66, formerly codified at 12 U.S.C. § 61.

[12] Bank Holding Company Act Amendments of 1966 § 13(c), Pub. L. 485, 89th Cong., 2d Sess., 80 Stat. 242 (1966); *Bank Holding Company Act Amendments of 1966*, S. Rep. No. 1179, 89th Cong., 2d Sess. at 12 (1966).

[13] As Controller O'Connor testified in 1935:

> Now, let me make that very particular: Here is a bank that has an impairment of its capital, and the Comptroller says,

Congress also was aware of the safety and soundness issue raised by eliminating stock assessability.[14] Congress, however, chose to address the safety and soundness issue by other means such as increasing the amount of capital required to be retained by banks, rather than by continuing to permit monetary assessments of the owners of national banks.[15]

These amendments to the National Bank Act, adopted during and out of the experience of the collapse of the banking system during the Great Depression, were motivated in large part by the determination of Congress that the *total elimination* of monetary assessments against national bank shareholders was necessary to attract new capital to rebuild the banking system.[16] Similar considerations weigh against the Board's latter-day attempt to revive for bank holding companies,

> "You have got to repair that capital and put up $100,000, or $1,000,000", and if there is no double liability, those directors and shareholders are not as interested in repairing that capital and working out the problems of that bank as if there was no double liability, because they are just apt to say, "Take it; its yours", and walk out of the picture.

Banking Act of 1935: Hearings Before House Comm. on Banking and Currency on H.R. 5357, 74th Cong., 1st Sess. 153 (testimony of Comptroller of the Currency O'Connor) ("1935 Hearings").

[14] As Comptroller of the Currency O'Connor testified:

> We must at once appreciate the fact that, by eliminating double liability on all national banks, we have tremendously weakened the banking structure of the nation. That must be clearly kept in mind. Therefore, I have suggested that, if the Congress decides to eliminate the double liability on all old national banks, the banks should be required to build up, out of their profits, some substantial amounts which shall go into a surplus fund of the banks.

1935 Hearings at 147 (testimony of Comptroller of Currency O'Connor).

[15] Banking Act of 1935, §§ 309, 315 (codified at 12 U.S.C. §§ 51, 60 (increasing surplus capital required to be retained by national banks)).

[16] 1935 Hearings at 153 (testimony of Comptroller O'Connor).

through its source-of-strength Policy Statement, the scheme of shareholder assessment statutes repealed long ago.[17] In the view of the FDIC:

> the "source-of-strength" doctrine does raise several questions. If this type of authority were asserted and proved to be enforceable, it would make investment in bank equities relatively unattractive: if the downside potential of an investment exceeds the initial commitment, investors will demand a higher expected return to compensate for the additional risk. It should be remembered that many bank stocks prior to the mid-1930s were subject to additional assessments if the bank experienced financial difficulties. This requirement was removed because of its negative effect on the ability of banks to raise new capital.[18]

Through the 1987 Policy Statement, the Board proposes, without benefit of statutory authority, to empower itself with unlimited authority to levy monetary assessments on corporate shareholders of banks, in direct contravention of the congressional repeal of shareholder assessment liability.

B. Congress Has Considered and Rejected Proposals to Reinstate Shareholder Assessment Authority

Congress has on numerous recent occasions considered various reformulations of the repealed bank shareholder assessment provisions. In 1987, Congress failed to act on legislation suggested by a House Committee Report that would have "implement[ed]" the Board's source-of-strength policy by creating a new liability rule that would have made "the holding company, in effect, commit all its resources to back the deposits of each bank or thrift

[17] See FDIC, *Mandate for Change: Restructuring the Banking Industry* 93-94 (Oct. 1987); FDIC, *Deposit Insurance for the Nineties, Meeting the Challenge* (Draft) (1989) ("FDIC 1989 Report to Congress") at 230.

[18] FDIC, *Mandate for Change: Restructuring the Banking Industry* 94 (Oct. 1987).

subsidiary." [19] Congress similarly failed to adopt a more limited source-of-strength assessment authority contained in a bill introduced by Congressman Barnard in 1987 that would have granted the federal banking regulators power to order a holding company to choose between adding capital to an inadequately capitalized subsidiary bank or divesting the bank.[20]

Again in 1988, Congress declined to grant the Board even a limited source-of-strength assessment power. That year, Senators Garn and Proxmire introduced S. 2715, the predecessor to the cross-guaranty provisions of FIRREA, which would have provided at least some statutory basis for a limited Board source-of-strength assessment authority. This bill would have amended section 5 of the BHC Act to authorize the Board, at the request of the FDIC, to require a bank holding company and its nonbank subsidiaries to contribute or transfer to any failing bank within the holding company system "such assets or services as are customarily utilized by a bank in the conduct of its business or operations." [21] The 1988 bill also would have granted power to the Board, at the request of the FDIC, to force a merger of affiliated banks. Board Chairman Greenspan recognized that the bill would "*establish*[] the principle that the financial strength of healthy segments of the system be used to bolster the capital or financial resources of a distressed banking affiliate." [22] In fact, Chairman Greenspan suggested that the hearing on the bill "*could explore whether* provision should be made to require the *nonbanking assets of the holding company* to be used to support an ailing bank affiliate." [23] The bill was not adopted.

[19] *Modernization of the Financial Services Industry: A Plan for Capital Mobility Within a Framework of Safe and Sound Baking*, H.R. Rep. No. 324, 100th Cong., 1st Sess. 48, 79-80 (1987).

[20] H.R. 3799, §101(d), 100th Cong., 1st Sess. (Dec. 18, 1987).

[21] S. 2715, 100th Cong., 2d Sess. § 2 (1988), *reprinted in* 134 Cong. Rec. S11,441 (daily ed. Aug. 10, 1988).

[22] *Oversight on the Condition of the Financial Services Industry: Hearings Before Senate Comm. On Banking, Housing and Urban Affairs*, 100th Cong., 2d Sess. 488 (1988) (letter from Alan Greenspan, Chairman of Federal Reserve Board, to Sen. William Proxmire (June 29, 1988)).

In enacting FIRREA in 1989, Congress had before it a number of *alternative* proposals advanced by the federal bank regulatory agencies on how to treat problem banks within a multibank holding company system. These alternative proposals included the Board's proposed source-of-strength assessment authority, and the FDIC's "cross-guaranty" proposal that all the banks within a holding company system (but not the holding company itself or its nonbank affiliates) should be subject to assessment for any loss incurred by the FDIC in disposing of any failed bank within the system. These alternative proposals were summarized in a comprehensive FDIC report on the banking system [24] that the FDIC presented to each member of the House and Senate banking committees,[25] and that shaped congressional debate on FIRREA. While Congress was considering FIRREA, Congressman Barnard introduced a bill similar to his proposed 1987 legislation, that included a limited source-of-strength assessment power, under which a holding company would have had to choose between agreeing to add capital to an in-

[23] *Id.*

[24] FDIC 1989 Report to Congress.

[25] *See Financial Condition of the Federal Savings and Loan Insurance Corporation and Federal Deposit Insurance Corporation at Year End 1988: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 612 (1989) (statement of L. William Seidman, Chairman, FDIC); *Financial Institutions Reform, Recovery and Enforcement Act of 1989 (H.R. 1278): Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 147 (1989) ("House FIRREA Hearings").

adequately capitalized subsidiary bank or divesting control of the bank.[26]

The FDIC, however, did not support Congressman Barnard's proposal. The FDIC argued in its 1989 Report to Congress that its "cross-guaranty" proposal was "the best alternative" for dealing with the issues raised by "problem banks" within a holding company system. By contrast, according to the FDIC, the Board's "source of strength" proposal had "*significant drawbacks compared to the other alternatives.*"[27] The FDIC concluded that the Board's source-of-strength assessment policy:

> will reduce market efficiency, limit the ability of banks to be viable competitors in the financial marketplace, and limit the ability to obtain new capital for the banking industry.[28]

According to the FDIC, "[c]ross-bank guarantees also *are preferable* to source-of-strength because they better preserve the distinctions between separate corporate entities within a holding company."[29] The FDIC concluded that its "cross-guaranty" proposal was "a more appropriate alternative" for dealing with problem banks within holding company systems than the Board's competing "source of strength" proposal.[30]

[26] H.R. 1992 § 101(d), 101st Cong., 1st Sess. (Apr. 13, 1989).

[27] FDIC 1989 Report to Congress at 233 (emphasis supplied).

[28] *Id.* at 230.

[29] *Id.* at 231 (emphasis supplied). The FDIC maintained that by obliterating "the distinctions between the separate corporate entities within a holding company system," and placing a bank holding company's nonbank as well as bank assets at risk when a bank subsidiary fails, the Board's "source of strength" proposal would impede bank holding company expansion into nonbanking areas, inhibit nonbanking firm entry into the banking industry, reduce market efficiency and lead to unwarranted expansion of regulatory authority. *Id.* at 229-230.

[30] *Id.* at 230.

Congress agreed with and adopted the FDIC's cross-guaranty proposal, which is now codified in section 5(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1815(e). Congress did not, however, enact the Barnard source-of-strength proposal or include in FIRREA any other provision granting source-of-strength assessment authority to the Board.[31] This omission is particularly notable because the FDIC had expressly advised Congress that the legal validity of the Board's purported source-of-strength assessment authority was both untested and uncertain, and that Congressional enactment of such authority would "represent[] a *significant expansion* of bank regulatory authority."[32]

Congress again had the source-of-strength assessment issue before it in considering the Crime Control Act of 1990, Pub. L. No. 101-647, Nov. 29, 1990. On May 17, 1990, two days after the court of appeals decided the *MCorp* case, the Senate Banking Committee heard testimony on the Board's source-of-strength assessment policy and the *MCorp* decision, as well as the practice of the Office of Thrift Supervision ("OTS") of obtaining net-worth maintenance agreements from holding companies as a condition of their acquisition of a savings and loan association.[33] The court of appeals in *MCorp* expressly

[31] The General Accounting Office has noted that section 206(e) of FIRREA "holds affiliated insured depository institutions liable for each other's losse *but does not extend this liability to holding companies unless they themselves are depository institutions.*" General Accounting Office, *Bank Powers: Report to the Chairman, Subcomm. on General Oversight and Investigations, House Comm. on Banking, Finance and Urban Affairs*, at 13 n.7 (Mar. 1990) (emphasis supplied).

[32] FDIC 1989 Report to Congress at 229, 231 (emphasis supplied).

[33] *Deposit Insurance Reform and Financial Modernization: Hearings Before Senate Comm. on Banking, Housing, and Urban Affairs*, No. 973, Vol. II, 101st Cong., 2d Sess. 236-45 (May 17, 1990) (statement of Lawrence Connell), *quoted in* 136 Cong. Rec. S13,825 (daily ed. Sept. 25, 1990).

noted this practice and suggested that the Board, therefore, was not without an adequate alternative to its alleged source-of-strength assessment authority. The court observed that "[a]s a condition to approving an application, the Board could possibly require the holding company to agree to maintain the subsidiary banks to some degree of financial soundness." [34]

As adopted, Title XXVII of the Crime Control Act enhances the enforceability of capital maintenance commitments (of the sort discussed in footnote 5 of the court of appeal's decision) in bankruptcy proceedings by providing, among other things, for their nondischarge in bankruptcy.[35] That Act does not, however, grant the Board or the FDIC authority to make involuntary source-of strength assessments against holding companies. Specifically, Congress failed to enact legislation introduced by Senate Banking Committee Chairman Riegle that would have granted the FDIC, but not the Board, a limited source-of-strength assessment authority by extending the FDIC's cross-guaranty assessment power to reach the assets of a holding company and other nonbank affiliates of a bank up to a maximum of five percent of the bank's assets.[36]

The question of a source-of-strength assessment authority is again before Congress in at least two pending bills. Section 101(d) of H.R. 192, introduced in the House of Representatives by Congressman Barnard on

[34] Board Pet. App. at 21a n.5. Although the Board complains that this statement offers it "little solace" Board Pet. at 27 n.21, the fact is that the Board has long recognized and used its application "conditioning" authority to extract such agreements. Board, Bank Holding Company Supervision Manual § 204.0 (1982).

[35] Crime Control Act, § 2722, 136 Cong. Rec. S18,323 (daily ed. Nov. 2, 1990).

[36] S. 3103 § 10, 100th Cong., 2d Sess., *reprinted in* 136 Cong. Rec. S13,831 (daily ed. Sept. 25, 1990).

January 3, 1991, would grant the federal banking agencies power to require a holding company to "contribute to the surplus capital of the insured depository institution, an amount necessary to bring the insured depository institution into compliance with the applicable minimum required capital adequacy."

Similarly, Title VI of H.R. 6, entitled "Source of Strength," was introduced on January 3, 1991 by House Banking Committee Chairman Gonzalez. This bill would invest the FDIC with source-of-strength assessment authority by expanding the cross-guaranty provisions of the Federal Deposit Insurance Act to assess bank holding companies and their nonbank subsidiaries for losses incurred by the FDIC in the insolvency of an affiliated bank. Significantly, the bill would not vest any comparable assessment authority in the Board.

In addition, the administration's newly-released report containing recommendations to Congress for substantial revisions to the federal banking statutes, proposes new statutory authority for a *limited* source-of-strength assessment power, under which a bank holding company that controls a bank that fails to meet capital standards would have to choose between bringing the bank into capital compliance, divesting the bank, or subjecting itself and all of its bank and nonbank affiliates to bank-style capital requirements.[37]

Notably, there has been only one amendment to section 3(c) of the BHC Act adopted since *First Lincolnwood* affecting the Board's statutory authority to consider the financial and managerial strength of a holding company at the time it acquires a bank. In that amendment, Congress, in response to *First Lincolnwood*, *narrowed* the Board's authority to consider the holding company's strength by limiting the Board's power to disapprove the

[37] U.S. Treasury Department, *Modernizing the Financial System, Recommendations for Safer, More Competitive Banks* at 61 (February 1991). In this regard, the Treasury proposal is similar to Congressman Barnard's 1987 and 1989 draft legislation discussed above.

formation of one-bank holding companies on source-of-strength grounds.[38]

This extensive history of consideration and rejection of a number of varying formulations of a source-of-strength assessment authority demonstrates that Congress as of this date continues to reject the earlier regime of shareholder assessment statutes. The Board's policy arguments for investing it with a source-of-strength assessment power should continue to be addressed to Congress,[39] which is even now considering whether the Board or the FDIC should have some form of this authority.

C. The BHC Act Provides No Source-of-Strength Assessment Authority

In the face of this express repeal of shareholder assessments and repeated Congressional rejection of proposals to restore various forms of shareholder assessment authority, the Board is left to rely on implied authority it believes it finds in three banking statutes. None of these Acts, singly or collectively, restore the shareholder assessment powers repealed by Congress.

The Board primarily relies on section 3 of the BHC Act, which directs the Board to consider the financial and managerial resources of a company at *the time the company seeks permission to acquire a bank.* This is the only authority upheld in *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978). Neither that decision nor the BHC Act, however, contain any suggestion that the Board is authorized to assess a bank holding company for the losses of its subsidiary banks.

As the court of appeals observed, "*First Lincolnwood* is narrowly written and expressly limits the

[38] Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 221, § 713, 94 Stat. 190, 96th Cong., 2d Sess. (Mar. 31, 1980), *codified at* 12 U.S.C. § 1842(c) (limiting Board's power to disapprove, based upon loan on bank stock, an application to form a one-bank holding company).

[39] *See, e.g., Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980).

Board's authority to consider financial and managerial soundness of subsidiary banks to the Board's decision to grant or deny a holding company's application." Board Pet. App. at 20a. The court of appeals also noted that the BHC Act does not grant the Board authority to establish or enforce capital levels for, or otherwise regulate banks owned by a bank holding company.[40] The court of appeals correctly rejected the Board's attempt to transform and expand its narrow statutory authority to consider the financial soundness of a bank holding company in passing upon its application to acquire a bank, into the authority to assess a bank holding company for the losses of its subsidiary banks, at any time, without limit and without any fault on the part of the holding company.

The Board concedes that the alleged monetary assessment authority at issue here "extends the Supreme Court's holding, in . . . *First Lincolnwood Corp.*"[41] As noted by Justices Stevens and Rehnquist's dissenting opinion, the Court in *First Lincolnwood* limited its holding concerning the Board's authority to deny applications to acquire a bank to a small subset of those applications in which the "effect" of the proposed "transaction would have been the formation of a financially unsound bank holding company."[42]

In 1984, when the Board amended its Regulation Y to provide that a "bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks,"[43] the Board made no suggestion that it

[40] Board Pet. App. at 20a-21a. The BHC Act does not grant the Board authority to regulate the activities of subsidiary banks of a bank holding company. *Independent Ins. Agents of America* v. *Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 44 (1990).

[41] Board Suggestion for Rehearing *En Banc* at 7 in *MCorp* v. *Board of Governors*, No. 89-2816 (5th Cir. June 27, 1990).

[42] 439 U.S. at 252 n.18, 258 n.6. Even on this narrow ground, the dissent found the majority's reasoning unpersuasive.

[43] 12 C.F.R. § 225.4; 49 Fed. Reg. 794, 820 (1984).

created an enforceable and unlimited obligation on the part of a bank holding company to downstream all its available assets into subsidiary banks.[44] Indeed, in the Regulation Y rulemaking proceeding, the Board received no substantive comments from the public on this reiteration of its existing source-of-strength policy.[45]

In February 1987, in an administrative enforcement action brought against the Hawkeye Corporation,[46] the Board for the first time asserted that it could assess a bank holding company for the losses of its subsidiary banks. In April 1987, on the eve of the scheduled administrative hearing against Hawkeye, the Board dismissed its source-of-strength charges and simultaneously issued a "Policy Statement" proclaiming its new "policy" that:[47]

> [A] bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity.[48]

The Board stated in its Policy Statement that a failure to provide capital to a troubled or failing subsidiary bank would be viewed as a violation of Regulation Y and an unsafe and unsound practice, and that "[w]here necessary, the Board is prepared to take supervisory action to require such assistance."[49]

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[44] *See* 49 Fed. Reg. 794 (1984); 48 Fed. Reg. 23,520 (1983).

[45] 49 Fed. Reg. 800 (1984).

[46] *In re Hawkeye Corp.*, No. 87-003-B-HC (Notice of Charges and Hearing Before the Board of Governors of the Federal Reserve System) (Feb. 5, 1987); Keeton, *Bank Holding Companies, Cross-Bank Guarantees and Source of Strength,* Federal Reserve Bank of Kansas City Economic Review 54, 61 (May/June 1990).

[47] *See Fed Drops Case Against Hawkeye,* Am. Banker May 4, 1987 at 11; 52 Fed. Reb. 15,707 (Apr. 30, 1987) (emphasis supplied); Keeton, *Bank Holding Companies, Cross-Bank Guarantees and Source of Strength,* Federal Reserve Bank of Kansas City Economic Review 54, 61 (May/June 1990).

[48] 52 Fed. Reg. 15,707 (1987).

[49] 52 Fed. Reg. 15,708 (1987).

Not surprisingly, federal bank regulators other than the Board—*i.e.,* the FDIC, the Resolution Trust Corporation and the OTS—have, in litigation concerning whether capital maintenance commitments are enforceable in court as contracts or in administrative proceedings as regulatory conditions, taken the position that language in the Savings and Loan Holding Company Act virtually identical to the BHC Act language relied on by the Board does not authorize source-of-strength assessments against savings and loan holding companies.[50] According to the FDIC, "[n]othing in the detailed regulations pertaining to savings and loan holding companies (or in any other statute or regulation) obligated a holding company to maintain the insured institution's net worth."[51] Similarly, the Resolution Trust Corporation acknowledges that:

> the absence of any statute or regulation expressly requiring savings and loan holding companies to maintain the solvency of the insured institutions under their control was precisely why the FHLBB/FSLIC's used net worth maintenance agreements.[52]

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[50] *Compare* 12 U.S.C. § 1467a(e)(2) ("the Director [of OTS] shall take into consideration the financial and managerial resources and future prospects of the company and association involved") *with* 12 U.S.C. § 1842(a) ("the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned").

[51] Brief of Appellant FDIC at 29, *In Re Conner Corporation,* (E.D.N.C. Sept. 28, 1990 No. 90-488 Civ-5-BO) (footnote omitted) (copy lodged with Clerk of this Court).

[52] Brief of Appellant Resolution Trust Corporation at 22, in *Resolution Trust Corporation* v. *Savers* (8th Cir. Sept. 28, 1990 No. 90-2037EA). The enforcement staff of the Office of Thrift supervision takes the same position. OTS Enforcement Review Committee Resolution No. 89-127 at 2, in the Matter of Gary L. Akin, Sole Stockholder, Chairman and Former President of TexasBanc Savings, F.S.B. (Nov. 7, 1990). (Copies lodged with Clerk of this Court).

The fact that the Board did not "discover" its purported source-of-strength assessment authority until 31 years after the BHC Act was adopted casts substantial doubt on the existence of any basis in the BHC Act for the alleged authority.[53] Moreover, the Board cites to no instance in which it has enforced an involuntary source-of-strength assessment against a bank holding company.

D. ILSA Provides No Source-of-Strength Assessment Authority

The Board also asserts that ILSA supports the Board's claimed assessment powers. Board Pet. 23. To the contrary, ILSA expressly withholds from the Board authority to establish capital levels for subsidiary banks of a bank holding company. While ILSA authorizes federal bank regulatory agencies to establish minimum capital requirements for banks, that Act defines the Board as the appropriate federal banking agency *only* for "bank holding companies and any *nonbank* subsidiary thereof" (emphasis added).[54] Nor does ILSA grant any agency authority to order bank holding companies to transfer their funds into subsidiary banks. In fact, the Board's 1984 rulemaking proposal implementing ILSA made no mention of any purported authority to require holding companies to contribute capital to subsidiary banks.[55] The Board in issuing this statement acknowledged that it "believes that it serves no useful purpose to increase bank capital at the expense of its parent holding company." *Id.* Increasing bank capital at the expense of the holding company, however, is precisely what the Board is attempting to accomplish through prosecution of source-of-strength charges.

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[53] *Cf. BankAmerica Corp.* v. *United States*, 462 U.S. 122, 130 (1983).

[54] 12 U.S.C. § 3902(1)(A) (defining "appropriate Federal banking agency" as meaning the Board for "(A) bank holding companies and any *nonbank* subsidiary thereof" (emphasis added)).

[55] 49 Fed. Reg. 30,317 (1984).

E. FISA Provides No Source-of-Strength Assessment Authority

The Board also suggests that its general authority under FISA, 12 U.S.C. § 1818, to exercise cease-and-desist powers to enjoin "unsafe and unsound" practices authorizes it to require a bank holding company to ignore its own separate corporate status and downstream its own assets into a subsidiary bank. Board Pet. at 3-4. It is clear, however, that "Congress never intended to give these agencies a 'blank check' authority" under the cease-and-desist provisions of section 1818.[56] Moreover, if Congress intended the federal banking agencies to have statutory authority under the cease-and-desist provisions of section 1818 to compel affiliates of a bank to inject capital into the bank, the enactment of section 206(e) of FIRREA, Pub. L. No. 101-73, 103 Stat. 183 (1989), granting the FDIC express statutory authority to make "cross-guaranty" assessments against affiliated banks would have been unnecessary, because the FDIC and the Board already would have had such authority. The court of appeals correctly refused to permit the Board to use its general remedial powers to bootstrap its way into the substantive assessment authority denied it by Congress.

F. FIRREA Provides No Source-of-Strength Assessment Authority

The Board suggests that, after the district court's decision in this case, Congress in section 902 of FIRREA (amending 12 U.S.C. § 1818(b)) provided the Board statutory authority to make source-of-strength assessments against bank holding companies. Board Pet. at 4. Section 902 plainly and expressly relates to restitutionary-type remedies where an institution-affiliated party has acted in a "reckless" manner or "was unjustly enriched" at the expense of a financial institution. Section 902 has nothing whatsoever to do with the Board's alleged

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[56] *Larimore* v. *Comptroller of the Currency*, 789 F.2d 1244, 1253 (7th Cir. 1986); *accord* S. Rep. No. 1482, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3532, 3538.

authority to make and enforce capital calls on bank holding companies regardless of fault for the losses of their subsidiary banks. The Board's alleged source-of-strength assessment authority is not limited to losses caused by the reckless conduct or involving the unjust enrichment necessary to invoke the restitutionary remedies of section 902. Instead, the Board's purported source-of-strength assessment authority turns solely upon the fact that a bank holding company owns a bank that needs additional capital.

The Board's policy arguments in favor of a source-of-strength assessment power are not a substitute for the statutory authority denied it by Congress. Like any federal administrative agency, the Board possesses only the authority that Congress grants it by statute.[57] The Board may not unilaterally expand this authority based on its own interpretation of the "broad purposes" of the statutes it administers.[58] As this Court held in *Dimension Financial Corp.*, "[i]f the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address." 474 U.S. at 374.

II. THE BOARD'S SOURCE-OF-STRENGTH ASSESSMENT POLICY IS VOID UNDER THE ADMINISTRATIVE PROCEDURE ACT

Even if the Board had statutory authority to adopt a source-of-strength assessment regulation (which, as discussed above, it does not), the Board's source-of-strength assessment Policy Statement is void and unenforceable

[57] *See, e.g., Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989); *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986); *American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U.S. 350 (1921); *Business Roundtable* v. *SEC*, 905 F.2d 406 (D.C. Cir. 1990); *Western Bancshares, Inc.* v. *Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

[58] *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986).

because it is a "substantive rule" adopted in violation of the notice-and-comment requirements of section 553 of the APA, 5 U.S.C. § 553.

In 1984, the Board adopted a regulation, 12 C.F.R. § 225.4(a), which used the phrase "source of strength" but which did not purport to create an enforceable obligation on the part of holding companies to infuse capital into subsidiary banks. The regulation merely codified prior Board statements that a bank holding company should serve as a source of strength to its subsidiary banks. None of these statements remotely suggested that holding companies were liable to make cash contributions to subsidiary banks. In adopting this regulation, the Board stated that "bank holding companies should observe the statements of policy issued by the Board from time to time concerning supervisory and other matters." [59]

In 1987, without any prior notice or opportunity for comment, the Board published a press release containing such a statement of policy which *does* purport to create an enforceable obligation to infuse capital into subsidiary banks, but which was not adopted in accordance with the notice and comment procedures required by the APA. The source-of-strength assessment Policy Statement does not appear anywhere in the Code of Federal Regulations. Indeed, it is not even published in Regulation Y with the other Board policy statements and interpretations concerning bank holding companies.

The source-of-strength Policy Statement was adopted by publication [60] effective as of a date six days before the publication date. In response to the Policy Statement, the Board received several comments challenging its ac-

[59] 48 Fed. Reg. 23,520, 23,523 (1983). The Board cannot lawfully issue a regulation which reserves for itself the authority to ignore the notice and comment requirements of section 553 of the APA when adopting future substantive changes in the regulation. Such an attempt would be a transparent evasion of the requirements of the APA.

[60] 52 Fed. Reg. 15,707 (1987).

tion on the grounds that the Policy Statement, without benefit of statutory authority, effected a substantial enlargement of a bank holding company's financial liability to its subsidiary banks.[61] The 1987 Policy Statement has never been revised or republished to reflect public comments.

Section 553 of APA requires that "substantive rules" be adopted by "notice-and-comment" procedure. Under this procedure, the required publication must be made at least 30 days prior to the effective date of the rule, and interested parties must be permitted to comment on the proposed rule *before* it is adopted by the agency.

The 1987 source-of-strength assessment rule cannot escape the notice-and-comment requirements of section 553 on a theory that it was promulgated through a release labeled a "Policy Statement" by the Board. The exceptions to the notice-and-comment requirements of section 553 for "interpretive rules" and "policy statements" are narrowly construed. The courts are not bound by the agency's labeling of a substantive rule as a "policy statement" or "interpretive rule."[62] Any rule that establishes binding norms, affects particular rights and obligations, has a substantial impact on a regulated industry, effects a change in existing law or policy, or creates new law, is a "substantive rule" that can be adopted only by the notice-and-comment procedure of section 553.[63]

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[61] *See* Letter from Richard S. Simmons, Chemical New York Corporation to Board (June 4, 1987); Letter from Peter Carlson to Board (June 26, 1987); Letter from Duke Financial Group, Inc. to Board (June 26, 1987); Letter from Baird, Hold, McEachen, Pedersen, Hammann & Strasheim (submitted on behalf of Hawkeye Bancorporation) to Board (June 30, 1987); Letter from Gary A. Speiss, General Counsel, Bank of Boston, to Board (June 30, 1987) (available in Board Docket No. R-0602).

[62] *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 700 (5th Cir. 1979).

[63] *See, e.g., Chrysler Corp.* v. *Brown*, 441 U.S. 281, 312-13 (1979); *Alcaraz* v. *Block*, 746 F.2d 593, 612 (9th Cir. 1984); *Dep't of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984);

The source-of-strength Policy Statement is a "substantive rule" because, by purporting to impose an enforceable unlimited obligation on bank holding companies to supply capital to subsidiary banks, it affects a change in the law, with a substantial impact on bank holding companies and their shareholders and creditors. Because 12 C.F.R. § 225.4(a) does not purport to authorize forced downstreaming of bank holding company capital into subsidiary banks, the 1987 Policy Statement cannot reasonably be deemed an interpretation of section 225.4(a).

"Substantive rules" such as the Policy Statement, adopted in violation of section 553 of APA are not enforceable.[64] As this Court has held:

> Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act. Section 4 of the APA, 5 U.S.C. § 553, specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment *before* a substantive rule is promulgated.[65]

Thus, even if the Board did have statutory authority to empower itself with a source-of-strength assessment authority (which it clearly does not), the Board's failure to adopt this authority as a substantive rule under the procedures dictated by the APA renders it void and unenforceable.

American Federation of Gov't Employees v. *Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *Pacific Gas & Elec. Corp.* v. *FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974); *Washington Fed. Sav. & Loan Ass'n* v. *FHLBB*, 526 F. Supp. 343, 383 (N.D. Ohio 1981).

[64] *See, e.g., Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 981-83 (3d Cir. 1980); *Detroit Edison Co.* v. *EPA*, 496 F.2d 244, 249 (6th Cir. 1974); *Guardian Fed. Sav. & Loan Ass'n* v. *FSLIC*, 589 F.2d 658, 664-65 (D.C. Cir. 1978).

[65] *Chrysler Corp.*, 441 U.S. at 313. (emphasis supplied, citations omitted).

III. THE COURT OF APPEALS PROPERLY INSTRUCTED THE DISTRICT COURT TO ENJOIN THE PROSECUTION OF THE BOARD'S SOURCE-OF-STRENGTH CHARGES

A. 12 U.S.C. § 1818(i) Did Not Bar The Court of Appeals From Remanding With Instructions to Enjoin Unlawful Agency Action

As demonstrated above, the Board is utterly devoid of authority to levy monetary assessments against bank holding companies on the basis of its source-of-strength Policy Statement. The Board, however, argues that 12 U.S.C. § 1818(i) barred the court of appeals from directing the district court to enjoin the Board's source-of-strength assessment proceeding. Section 1818(i) provides:

> [E]xcept as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order.

12 U.S.C. § 1818(i)(1).

Section 1818(i) does not shelter the Board's *ultra vires* action to enforce its invalid source-of-strength assessment policy. Established Supreme Court authority and the prior rulings of the courts of appeal make clear that a statute, such as section 1818(i), that prescribes a general procedure for judicial review, does not bar a court's jurisdiction to enjoin an administrative proceeding that is beyond the authority of the administrative agency. *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958); *Manges* v. *Camp*, 474 F.2d 97 (5th Cir. 1973). Indeed, the Fourth Circuit has ruled that the holding in "*Leedom* v. *Kyne requires* that a federal court ascertain whether an administrative agency is acting within its authority. . . ." *Champion Int'l Corp.* v. *EPA*, 850 F.2d 182, 186 (4th Cir. 1988) (emphasis added); *see also Dart* v. *United States*, 848 F.2d 217, 221 (D.C. Cir. 1988) ("Judicial review is favored when an agency is charged with acting beyond its authority.")

In *Manges* v. *Camp*, 474 F.2d 97, 99 (5th Cir. 1973), the Fifth Circuit specifically applied the *Leedom* v. *Kyne* doctrine to section 1818(i) and stated:

> There is . . . a very strong court created exception to withdrawal statutes. This exception comes into play when there has been a clear departure from statutory authority, and thereby exposes the offending agency to review of administrative action otherwise made unreviewable by statute.

Thus the court held that, under the doctrine of *Leedom* v. *Kyne*, section 1818(i) was inapplicable because the order at issue exceeded the Comptroller's statutory authority in that it prohibited a bank shareholder from voting his shares or participating in the management of the bank based upon conduct not covered by the Comptroller's removal authority.[66]

Because the Board has no statutory authority to make a source-of-strength assessment against a bank holding company, there is no substance to the Board's contention that the court of appeals was constrained to await the completion of the Board's source-of-strength proceedings and the issuance of a final assessment order against MCorp before interdicting the proceeding. As the Fourth Circuit has confirmed:

> If an agency acts in clear derogation of its statutory authority, a court need not wait for the underlying proceedings to conclude to intervene. *Leedom* v. *Kyne*, 358 U.S. 184, 188, 79 S. Ct. 180, 183, 3 L. Ed. 2d 210 (1958).

Gracey v. *Local 1340 International Brotherhood of Elec. Workers*, 868 F.2d 671, 674 n.1 (4th Cir. 1989).

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[66] *See also Graham* v. *Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978) ("[i]f an administrative official clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdictional withdrawal statute is otherwise applicable."); accord, *MidAmerica Bancorp* v. *Board of Governors*, 523 F. Supp. 568, 574 (D. Minn. 1980) ("The language [of section 1818(i)] cannot be read literally, however. It must yield to an interpretation that permits a district court to enjoin Board actions that clearly exceed its statutory authority.")

B. Exhaustion Doctrine Is Inapplicable

Conceding that section 1818(i) does not constitute a "jurisdictional bar", Board Pet. 20, the Board invokes the doctrine of exhaustion of administrative remedies. Board Pet. 22. As demonstrated by the cases cited in the preceding section, that doctrine is irrelevant to a proceeding beyond the authority of the agency. Moreover, requiring MCorp to exhaust its administrative remedies would advance none of the purposes served by the exhaustion doctrine. The compiling of a factual record, the proper framing of issues in dispute, permitting the agency to apply its expertise, and the efficient administration of justice are common rationales for the exhaustion requirement.[67] Such rationales do not apply here because, as the court of appeals noted, no facts are disputed, the issue is a purely legal one concerning the alleged statutory authority of the Board to levy monetary assessments against holding companies, the courts are expert in matters of statutory interpretation, and the prompt judicial resolution of the dispute eliminates unnecessary administrative proceedings and is in the interest of efficient judicial administration.[68] This Court, on a number of occasions, has ruled that exhaustion is not necessary when the dispute concerns a purely legal issue.[69]

C. 28 U.S.C. § 2106 Authorized The Court of Appeals to Direct the Entry of an Injunction Against the Board's Unlawful Source-of-Strength Proceeding

An independent grant of appellate jurisdiction affirms the authority of the court of appeals to direct the entry

[67] *McKart* v. *United States*, 395 U.S. 185, 193-201 (1969); *Consumers Union of the United States, Inc.* v. *Cost of Living Council*, 491 F.2d 1396, 1399 (Temp. Emer. Ct. App. 1974).

[68] Board Pet. App. at 15a.

[69] *See e.g., McKart*, 395 U.S. at 197-99; *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967); *see also, Frontier Airlines, Inc.* v. *Civil Aeronautics Bd.*, 621 F.2d 369, 371 (10th Cir. 1980); *National Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F.2d 689, 695 (D.C. Cir. 1971); *Shell Oil Co.* v. *Federal Energy Adm'n*, 400 F. Supp. 964, 968 (S.D. Tex.), *aff'd*, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975).

of an injunction against the Board's source-of-strength assessment proceeding. Specifically, 28 U.S.C. § 2106 provides that any "court of appellate jurisdiction may affirm, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Appellate courts have invoked jurisdiction under section 2106 "in the interest of judicial economy."[70] Indeed, "to obviate further and entirely unnecessary proceedings below," this Court in *Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968), reversed certain convictions on the basis of 28 U.S.C. § 2106 rather than vacating those convictions. As in *Grosso*, the court of appeals resolved a clear legal issue properly before it, and lawfully directed the district court to enjoin the prosecution of the proceedings that were *ultra vires*. Had the court of appeals remanded to the Board, the inevitable consequence would have been the issuance of a source-of-strength assessment against MCorp followed by a challenge, *in the very same court of appeals*, to the legality of such a source-of-strength assessment order. Such a course would have produced only delay and a waste of judicial resources.[71]

Finally, the appropriateness of the court of appeals resolving the source of strength issue is underscored by

[70] *Government of the Virgin Islands* v. *Smith*, 445 F.2d 1089, 1095 (3d Cir. 1971).

[71] *Grosso*, 390 U.S. at 71-72; *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1968); *In re Hronek*, 563 F.2d 296, 298 (6th Cir. 1977); *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

Contrary to the Board's assertion, Board Pet. at 18 n.15, the absence of a cross-appeal did not deprive the court of appeals of jurisdiction, particularly in view of the fact that the source-of-strength assessment issue was briefed both before the district court and the court of appeals. *See Dayton Board of Ed.* v. *Brinkman*, 433 U.S. 406, 418-19 (1977); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 433, 435-36 (1924); *In re Swine Flu Immunization Products Liability Litig.*, 880 F.2d 1439, 1444 (D.C. Cir. 1989).

the fact that no practical purpose would be served by this Court's reviewing the Board's jurisdictional argument. Even if that argument were valid, MCorp still would obtain an early judicial ruling on the invalidity of the Board's asserted source of strength assessment authority through an alternative jurisdictional route—namely review of the outstanding temporary cease-and-desist orders issued against MCorp at the outset of this proceeding. *See* Board Pet. at 8-9.[72]

CONCLUSION

For the reasons stated herein, the Board's petition for certiorari should be denied.

Respectfully submitted,

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[72] The United States district courts have jurisdiction to issue an injunction "setting aside, limiting, or suspending" a temporary cease-and-desist order. 12 U.S.C. § 1818(c)(2). MCorp timely appealed from the temporary orders, which appeal the district court stayed for the duration of the preliminary injunction issued in this proceeding.

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 22 of the Banking Act of 1933, formerly codified at 12 U.S.C. § 64a:

> SEC. 22. The additional liability imposed upon shareholders in national banking associations by the provisions of section 5151 of the Revised Statutes, as amended, and section 23 of the Federal Reserve Act, as amended (U.S.C., title 12, secs. 63 and 64), shall not apply with respect to shares in any such association issued after the date of enactment of this Act.

Section 304 of the Banking Act of 1935, formerly codified at 12 U.S.C. § 64a:

> SEC. 304. Section 22 of the Banking Act of 1933, as amended, is amended by adding at the end thereof the following sentences: "Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: *Provided*, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or country, then in a newspaper of general circulation therein. If the association fail to give such notice as and when above provided, a termination of such additional lability may thereafter be accomplished as of the date six month subsequent to publication, in the manner above provided."

Section 2 of the Act of May 18, 1953, formerly codified at 12 U.S.C. § 64a.

> SEC. 2. Section 22 of the Banking Act of 1933, as amended, is hereby amended by adding at the end

thereof the following sentence: "In the case of each association which has not caused notice of such prospective termination of liability to be published prior to the effective date of this amendment, the Comptroller of the Currency shall cause such notice to be published in the manner provided in this section, and on the date six months subsequent to such publication by the Comptroller of the Currency such additional liability shall cease."

Section 7 of the Act of Sept. 8, 1959:

SEC. 7. Section 5151 of the Revised Statutes (12 U.S.C. 63) and section 23 of the Federal Reserve Act (12 U.S.C. 64) are repealed.

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.